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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

Amendment of Part 25 of the
Commission's Rules to Establish
Rules and Policies Pertaining to
the Second Processing Round of the
Non-Voice, Non-Geostationary Mobile
Satellite Service

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

IB Docket No. 96-220

COMMENTS OF ORBITAL COMMUNICATIONS CORPORATION

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SUMMARY

The Commission initiated this proceeding to develop licensing and service rules that will permit the Commission to complete the second processing round for the Non-Voice, Non-Geostationary ("NVNG") Mobile-Satellite Service ("MSS"). ORBCOMM is interested in this proceeding as the originator of this new service, an NVNG licensee now offering commercial intermittent service, and as a current applicant being considered in this second processing round. While ORBCOMM agrees with the Commission's goal of concluding the second processing round expeditiously, it believes that several of the proposals in the NPRM are ill-considered, inadequately justified, and contrary to the public interest.

ORBCOMM urges the Commission not to adopt the proposal to exclude any of the current NVNG licensees from eligibility to obtain spectrum in this second processing round. Such an exclusion would be of dubious legality. The NPRM's attempted justification for such a policy focuses too narrowly on simply increasing the number of competitors, without adequately addressing the public interest ramifications.

The proposal to implement a new eligibility restriction would also constitute unlawful retroactive rulemaking, because no such eligibility limitation existed when the Commission initiated this processing round. ORBCOMM reasonably assumed that it would be permitted to obtain access to additional spectrum in this processing round. The Commission traditionally has recognized the need for satellite systems to plan expansion capacity years in advance in recognition of the significant lead time necessary

for designing, constructing and launching new satellites. Moreover, the Commission affirmatively placed the other two NVNG licensees' applications for additional spectrum into the second processing round.

ORBCOMM also believes that the proposal to adopt a new eligibility restriction would not serve the public interest, because ORBCOMM would create many public interest benefits through use of only a small amount of additional spectrum. ORBCOMM's proposed modification will allow greater reliability and enhanced coverage of Alaska and Europe, thereby creating new export opportunities, enhanced efficiency and new jobs.

The NPRM attempts to justify the new eligibility restriction by using a textbook market analysis. That analysis, however, is severely flawed. That analysis fails to include within the relevant market foreign-licensed NVNG satellite systems, Big LEO satellite systems, Geostationary mobile satellite systems and terrestrial systems all of which may compete against the Little LEOs. The market analysis is also defective to the extent that there is no real-world information that can be factored into the analysis, because the NVNG satellite systems have not yet become fully operational. Thus, any conclusions from use of this model will simply be the result of assumed or hypothetical conditions.

ORBCOMM also urges the Commission to apply its financial qualification standards strictly. While ORBCOMM believes that the Commission cannot lawfully impose a new standard to the second round applicants, it should rigorously enforce its current tests. The second round applicants should

not be permitted to understate the full costs of deploying their initial two satellites, and must demonstrate a current ability to meet all of those expenses.

With respect to the sharing proposals, ORBCOMM offers a few suggestions. ORBCOMM urges the Commission to reserve the WRC-95 spectrum, at least initially, for the current applicants. The Commission should allow the new systems to use that spectrum, as well as the lower half of the 148-149.9 MHz band, for their uplinks. ORBCOMM believes that the Commission has the authority to set aside spectrum in this manner without opening a new processing round, and that such a policy serves the public interest by creating incentives for the applicants to continue supporting U.S. efforts to obtain additional spectrum allocations at the upcoming WRCs.

ORBCOMM also urges the Commission to abandon its proposal to use auctions to assign NVNG service licenses. In light of the inherently global nature of Little LEOs, auctions will create delays, complications and uncertainty that cannot be tolerated by the NVNG satellite system applicants. In addition, auctions are likely to make it more difficult for the United States to obtain additional allocations or orbital slots for satellite services at future WRCs.

Finally, ORBCOMM urges the Commission not to adopt new requirements that would impose on NVNG satellite system operators the duty to determine the location of the user before allowing transmission of a message. Such a requirement would impose significant costs in the form of greater power consumption (an important factor for battery powered transceivers), higher cost

units, larger and heavier units, and significantly greater "overhead" for every message that would render the NVNG satellite systems uneconomical. Moreover, such a requirement is unnecessary since less burdensome methods exist for addressing what presently is only a potential problem.

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COMMENTS OF ORBITAL COMMUNICATIONS CORPORATION

Orbital Communications Corporation ("ORBCOMM") hereby comments on the Federal Communications Commission's ("Commission's") proposed rules to govern the second processing round for the Non-Voice, Non-Geostationary ("NVNG") Mobile-Satellite Service ("MSS").^{1/} Through this NPRM, the Commission intends to adopt rules to govern the processing of the second round of NVNG satellite system applications. As a first round licensee, a second round applicant (by virtue of its request for additional spectrum to enhance its system), and a leader in the development of commercial low-Earth orbit ("LEO") mobile

^{1/} Amendment of Part 25 of the Commission's Rules to Establish Rules and Policies Pertaining to the Second Processing Round of the Non-Voice, Non-Geostationary Mobile Satellite Service, Notice of Proposed Rulemaking, IB Docket No. 96-220, FCC 96-426, released October 29, 1996 (hereafter "NPRM"). The Commission granted an extension of time with respect to the dates for submitting comments and amended applications. Amendment of Part 25 of the Commission's Rules to Establish Rules and Policies Pertaining to the Second Processing Round of the Non-Voice, Non-Geostationary Mobile Satellite Service, Order, DA 96-1989, released November 27, 1996.

satellite services, ORBCOMM is very interested in this proceeding. As detailed below, ORBCOMM strongly disagrees with several aspects of the Commission's proposal, and does not believe that the proposed second round processing rules will serve the public interest or lead to the prompt licensing of the second round applicants.

I. Introduction

ORBCOMM has been an active participant before the Commission with respect to the NVNG satellite service from the inception of this new service. ORBCOMM was formed in 1990 by Orbital Sciences Corporation ("OSC") to enter the mobile satellite services business. Founded in 1982, OSC is one of the country's leading commercial space technology companies. It designs, manufactures, operates and markets a broad range of space products and services, including launch systems, satellites, space sensors and electronics, suborbital tracking and data systems, and satellite-based communications and remote sensing systems.

In February 1990, ORBCOMM submitted to the Commission a petition for amendment of Section 2.106 of the rules to establish a mobile satellite service for two-way data communications and position determination using LEO satellites, along with an application for authority to construct such a satellite system.^{2/}

^{2/} Orbital Communications Corporation, RM No. 7334, Public Notice Report No. 1814, April 4, 1990; Orbital Communications Corporation, File No. 22-DSS-MP-90(20), Public Notice Report No. DS-953, April 11, 1990.

ORBCOMM's initial petition for rulemaking and application for a commercial LEO satellite system sparked significant activity over the ensuing years. In response to the ORBCOMM petition for rulemaking, the Commission allocated spectrum for the new service,^{3/} and completed a rulemaking -- using the FCC's negotiated rulemaking procedures for the first time -- to develop the licensing and service rules for the NVNG satellite service.^{4/} In October 1994, the Commission licensed ORBCOMM to construct, launch and operate its NVNG satellite system, and thereafter issued licenses for ORBCOMM's four gateway Earth stations as well as a blanket license for 200,000 subscriber communicators.^{5/} The Commission also later licensed the other two first round applicants -- STARSYS Global Positioning, Inc. ("Starsys") and Volunteers in Technical Assistance ("VITA").^{6/}

The regulatory activities necessitated by ORBCOMM's original application and petition for rulemaking extended well beyond the United States. Largely through the efforts of ORBCOMM

^{3/} Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum to the Fixed-Satellite Service and the Mobile-Satellite Service for Low-Earth Orbit Satellites, Report and Order, 8 FCC Rcd 1812 (1993).

^{4/} Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Non-Voice, Non-Geostationary Mobile Satellite Service, Report and Order, 8 FCC Rcd 8450 (1993).

^{5/} Orbital Communications Corporation, Order and Authorization, 9 FCC Rcd 6476 (1994); recon. denied, 10 FCC Rcd 7801 (1995); Orbital Communications Corporation, Blanket Subscriber Terminal Authorization, 10 FCC Rcd 6572 (1995); Domestic Fixed Satellite Service Public Notice, Report No. DS-1536, May 24, 1995; Domestic Fixed Satellite Service Public Notice, Report No. DS-1544, June 21, 1995.

^{6/} STARSYS Global Positioning, Inc., Order and Authorization, 11 FCC Rcd. 1237 (1995); Volunteers in Technical Assistance, Order and Authorization, 11 FCC Rcd 1358 (1995).

and the U.S. government, the agenda for the 1992 World Administrative Radio Conference ("WARC-92") included consideration of a global allocation of up to 4 MHz of spectrum below 1 GHz for non-geostationary mobile satellite services. Representatives from ORBCOMM served as advisors to the U.S. delegation at WARC-92, and participated in the conference in Torremolinos, Spain.

As a result of the work of ORBCOMM and the U.S. delegation, as well as the high level of interest from many other nations, WARC-92 allocated spectrum for non-geostationary mobile satellite services.^{7/} Subsequently, in setting the agenda for WRC-95, the 1993 World Radiocommunication Conference included the topic of mobile satellite services below 3 GHz and the need to review the technical constraints for those services. ORBCOMM actively participated in the preparatory activities for that conference, and ORBCOMM representatives also served on the delegation. WRC-95 allocated some additional spectrum for below 1 GHz LEO satellite services,^{8/} and placed the need for additional allocations on the agenda for WRC-97. The United States is continuing to develop the positions it will take at WRC-97, and ORBCOMM is actively participating in the various preparatory activities underway.

^{7/} WARC-92 designated some 9.9 MHz of spectrum below 1 GHz for non-geostationary mobile satellite services. However, only 3.6 MHz was allocated on a primary or co-primary basis, with the other 6.3 MHz allocated on a secondary basis.

^{8/} WRC-95 allocated an additional 2 MHz of spectrum for NVNG satellite services in the 455-456 MHz and 459-460 MHz bands.

ORBCOMM has continued its international regulatory efforts. ORBCOMM, working with the U.S. government, successfully coordinated its NVNG satellite system through the new ITU procedures (i.e., Resolution 46) with more than a dozen countries. As a result of those efforts, the ORBCOMM system (LEOTELCOM-1) was recently notified to the ITU. ORBCOMM has also actively participated in the efforts of Working Party 8D, CITEL, the ITU World Telecommunication Policy Forum and the recently initiated standards development activities of ETSI. All of these activities have helped to advance the availability of NVNG satellite services on a global basis.

ORBCOMM's activities have extended well beyond the regulatory arenas. Pursuant to experimental authority, ORBCOMM constructed and launched two experimental satellite payloads designed to gather data on usage of the 148-149.9 MHz band around the world. ORBCOMM also constructed and launched the initial two satellites in its constellation, and has begun limited commercial NVNG services using those satellites. ORBCOMM contracted with OSC for the construction and launch of the remaining satellites in its constellation, which will be launched beginning next year. Furthermore, ORBCOMM has constructed its network operations center in Dulles, Virginia, and has deployed four gateway Earth stations in the United States. ORBCOMM is developing the proprietary protocols, billing and customer service software, and management control software necessary to allow the system to provide full commercial service. To date, ORBCOMM has transmitted over one million messages using the initial two

satellites, the network operations center and the U.S. gateway Earth stations.

To ensure the availability of subscriber terminals, ORBCOMM has also entered into arrangements with five different manufacturers for the production of subscriber transceivers, several versions of which are now available to consumers. ORBCOMM has worked closely with these manufacturers to support their efforts, but each of them has borne their own research and development costs.

Rather than providing service directly to end users, ORBCOMM generally expects to provide service to resellers and other enhanced services providers. To that end, ORBCOMM has already entered into agreements with some 27 service providers who will facilitate the availability of its satellite service to customers in the United States. With respect to service in other countries, ORBCOMM intends to operate through local partners/licensees. To date, ORBCOMM has entered into definitive agreements with four such licensees, who will provide services using the ORBCOMM system in over fifty countries, and is in active discussions with approximately 18 other companies covering more than 35 additional countries around the world.

In sum, ORBCOMM has completed the numerous regulatory and business steps necessary to bring its services to market. Indeed, given its pivotal role in the domestic and international regulatory fora, ORBCOMM believes there would not be an NVNG satellite service but for the significant efforts of ORBCOMM. ORBCOMM thus urges the Commission to take into account ORBCOMM's extensive experience in actually bringing to market mobile

satellite services when weighing the various comments in this proceeding.

As a first round licensee, ORBCOMM may be impacted by the second round applicants, particularly to the extent that the NPRM suggests sharing of the spectrum in the bands in which ORBCOMM is authorized to operate. Under the Commission's Rules, the second round applicants are obligated to demonstrate that their satellite systems will not cause harmful interference to ORBCOMM's NVNG satellite system.^{9/} ORBCOMM also recognizes its obligation to coordinate with other permittees and licensees in the NVNG satellite service.^{10/} ORBCOMM's status as a first round licensee thus provides it with a strong interest in the Commission's proposals for processing the second round applications.

ORBCOMM also has a significant interest in this proceeding because it filed a modification request that is being considered in this processing round. ORBCOMM submitted an application to modify its system by adding twelve satellites to its constellation (necessitating a small increase in required spectrum) and moving its gateway uplink to the Transit Band (149.9-150.05 MHz).^{11/} With respect to this latter aspect of its

^{9/} 47 C.F.R. § 25.142(a)(1).

^{10/} See 47 C.F.R. § 25.142(b)(3).

^{11/} Orbital Communications Corporation, File No 28-SAT-MP/ML-95. Report No. DS-1484, November 25, 1994. Ironically, ORBCOMM had urged the Commission not to initiate the second processing round in the Fall of 1994, arguing that it was premature to do so even before completing the initial processing round. See, Letter to Kathleen Wallman from Albert Halprin and Stephen Goodman, dated September 28, 1994. ORBCOMM's predictions of the potential

(continued...)

pending application, ORBCOMM assisted the Commission in its recent coordination with the French government with respect to, inter alia, multiple NVNG satellite systems' use of the Transit Band.^{12/}

In its modification request, ORBCOMM demonstrated that the public interest would be well served by allowing ORBCOMM to increase the number of satellites in its constellation (requiring an additional 90 kHz for ORBCOMM's spectrum requirements), and to migrate its gateway uplinks into the Transit Band. Both of these changes will improve system reliability, and thereby result in better service to the public. In addition, the increase in the number of satellites will expand system availability in the Northern latitudes by 50% or more (including specifically in Alaska, Canada and Northern Europe), which will have the further benefit of enabling ORBCOMM to "export" service to other parts of the world. These proposed modifications will also enhance economic efficiency and improve our international balance of trade, which should in turn lead to an increased number of jobs in the United States. In light of these potential benefits from its pending modification request, ORBCOMM thus also has a

^{11/}(...continued)

delays and other problems likely to emerge from the premature creation of the second processing round have proven to be accurate, as reflected in the fact that the second round applicants will need to redesign their systems to fit into the spectrum blocks identified in the NPRM in order to file by the January deadline (and may have to do so yet again if the Commission subsequently adopts still different frequencies for the second round licenses than those proposed in the NPRM).

^{12/} NPRM at ¶ 69.

critical interest in this proceeding in its role as a second round applicant.

II. ORBCOMM Urges the Commission Not to Adopt the Proposal to Exclude First Round Licensees or Their Affiliates from the Second Processing Round

In the NPRM, the Commission proposes now to limit the eligibility for the second processing round by excluding first round licensees or entities affiliated with first round licensees.^{13/} ORBCOMM contends that such a proposal amounts to unlawful retroactive rulemaking. Equally important, ORBCOMM believes that such a policy is based on flawed economic analyses and would disserve the public interest. ORBCOMM therefore urges the Commission not to adopt this proposed limitation on eligibility.

A. The Proposed Eligibility Limitation is Unlawful

The NPRM's proposal to impose an eligibility limitation that would preclude any of the current licensees from obtaining additional spectrum in this processing round suffers from two fatal legal flaws -- (i) the proposal has been inadequately justified and (ii) it will be applied retroactively.

^{13/} NPRM at ¶¶ 11-38. Indeed, the NPRM goes so far as proposing not to allow the first round licensees access to any of the currently allocated NVNG spectrum that the second round licensees decline, suggesting instead that any such undesired segments would be held for a future processing group. NPRM at ¶ 79. ORBCOMM can conceive of no legitimate basis for denying the first round licensees with access to even such rejected spectrum.

1. The NPRM's Focus Simply on Increasing
the Number of Competitors Is Too Narrow

The NPRM attempts to justify this eligibility limitation proposal on a simplistic goal of "promoting multiple entry and competition,"^{14/} without critically assessing whether such a goal will enhance the public interest under the circumstances present here. The Commission, however, cannot simply invoke "competition" as a talisman, and thereby forego a broader public interest analysis.^{15/} As ORBCOMM demonstrated in its modification application, the public interest would be well served by grant of its request.^{16/} The Commission should not ignore such evidence and proceed solely under a policy of maximizing the number of entrants.

2. The Commission May Not Retroactively Revise
the NVNG Eligibility Rules in This Proceeding

In 1991, the Commission asserted that it could "change its eligibility criteria in rulemaking proceedings as long as [it] provide[s] adequate explanation for the change."^{17/} The

^{14/} NPRM at ¶ 11.

^{15/} E.g., FCC v. RCA Communications, Inc., 346 U.S. 86, 94 (1953), where the Court held that the Commission could not authorize a competing international radiotelegraph service solely by invoking a national policy in favor of competition. See also, FCC v. Sanders Radio Station, 309 U.S. 470 (1940); Telocator Network of America v. FCC, 691 F.2d 525 (D.C. Cir. 1982).

^{16/} See also, pp. 16-21, infra.

^{17/} In the Matter of Amendment of Part 22 of the Rules, First Report and Order and Memorandum Opinion and Order on Reconsideration, 6 FCC Rcd. 6185, 6193 (1991) (citing United States v. Storer, 351 U.S. 192 (1956)).

Commission's claimed power, however, is inconsistent with the pronouncement of the Supreme Court with regard to the ability of an administrative agency to engage in retroactive rulemaking. It is hornbook law that "a court should not uphold an agency attempt to make a legislative rule retroactive absent . . . an express grant of retroactive rulemaking power even 'where some substantial justification for retroactive rulemaking is presented.'" ^{18/} The Commission's proposal to adopt new eligibility criteria that would now render ineligible applicants who were not ineligible when the processing round was initiated would constitute such retroactive rulemaking.

While the Communications Act provides the Commission with the authority to establish eligibility criteria in the public interest, ^{19/} the Communications Act does not vest the Commission with the power to revise eligibility criteria and apply them retroactively. This is particularly true when, as here, existing licensees have reasonably relied on the

^{18/} See Kenneth Culp Davis and Richard J. Pierce, Jr., Administrative Law Treatise 257 (1994) (citing Bowen v. Georgetown University Hospital, 488 U.S. 204, 208-09 (1988)). See also, Informal Complaint of Direct Dial Audio Corporation, DA 96-1947, released November 21, 1996 at p. 3, where the Commission recently indicated:

Your complaint would also require a retroactive application of the Commission's rules implementing section 251. . . . Administrative rules do not have retroactive effect absent express authority from Congress. Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988). The Telecommunications Act of 1996 does not contain language that permits retroactive application.

^{19/} See 47 U.S.C. § 309(a).

Commission's own indications that such licensees would retain their eligibility in the second round.

The Commission has also reasoned that "the fact that [a rule change] collaterally affect[s] a petitioner's expectations does not render the change retroactive, unlawful, or unreasonable."^{20/} The Supreme Court has found, however, that "[a] rule that has unreasonable secondary retroactivity -- for example, altering future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule -- may for that reason be 'arbitrary' or 'capricious.'"^{21/} As the Commission is well aware, ORBCOMM (and the other first round licensees or companies affiliated with first round licensees) has expended substantial resources in this proceeding in applying for service licenses, participating in this processing round and participating actively and extensively in the various WRC preparatory activities.

3. ORBCOMM Reasonably Believed That It Would Be Eligible for the Second Round

The Commission claims that "first round applicants had no reason to believe that, in addition to approving their sharing proposal, we might grant first round licensees expansion capacity."^{22/} To the contrary, the Commission had provided ORBCOMM with multiple reasons to believe that it would retain its

^{20/} Amendment of Part 22 of the Commission's Rules, 6 FCC Rcd. 6185, 6193 (citing Bowen at p. 216 (J. Scalia concurring)).

^{21/} Bowen at p. 216 (J. Scalia concurring).

^{22/} NPRM at ¶ 37.

eligibility in the second round. First, there had been no indication in the Public Notice inviting applications to be considered in this processing round that ORBCOMM and the other first round licensees would be excluded from the second round, nor was there anything in Part 25 that limited the eligibility of applicants seeking a second round assignment of spectrum. Until the NPRM, the Commission had not expressed any indications of an intent to limit the ability of the first round licensees to also become second round licensees during the roughly two years this processing round has continued. Indeed, the Commission's actions have affirmatively indicated that first round licensees would retain their eligibility.

In declining to grant Starsys's request for use of the 149.9-150.05 MHz band, for example, the Commission determined that "the portion of [Starsys's] amendment requesting those frequencies protect[s] Starsys's right to request expansion frequencies in the second processing round."^{23/} Likewise, the Commission treated amendments to VITA's application as part of this second processing round, stating that "[t]he November 1994 and subsequent amendments will be addressed separately in connection with the second processing round for NVNG MSS applications."^{24/} Thus, the Commission affirmatively placed Starsys and VITA into this second processing round, creating

^{23/} STARSYS Global Positioning, Inc., Order and Authorization, 11 FCC Rcd. 1237 at ¶ 21.

^{24/} Volunteers in Technical Assistance, 11 FCC Rcd 1358 at ¶ 8.

strong evidence that the first round licensees were eligible to participate in the second processing round.^{25/}

Second, other provisions of the Commission's Rules for satellites reflect the policy that the Commission will permit incumbent licensees to obtain additional capacity, even if they have vacant orbital positions. Section 25.140(g) refers to the number of additional orbital locations that an existing licensee may be assigned under certain specified conditions, and allows for expansion capacity well in advance of its actual use.^{26/} Indeed, as the Commission recently observed in granting expansion satellites to Hughes and denying PanAmSat's request that orbital positions be set aside for new entrants, there is an important policy underlying this provision of the Commission's Part 25 Rules:

PanAmSat's arguments are without merit. We have always permitted satellite operators to expand their services. [n. 16 - 47 C.F.R. § 25.140(g) grants incumbent satellite operators one additional orbit location in each frequency band in which it is authorized to operate, to permit the growth of a particular satellite system, while protecting against warehousing.] Our expansion rule was designed to provide licensees some certainty

^{25/} Moreover, because it assumed that an amendment requesting additional capacity would be treated as a major amendment -- and thus a new application filed past the first round cut-off date -- ORBCOMM forwent the opportunity to seek additional spectrum (i.e., use of the Transit Band) in the first round. Any indication from the Commission that first round licensees might be excluded from the second round would have affected ORBCOMM's decisions in this proceeding. Indeed, ORBCOMM assisted the Commission in coordinating the Transit Band with the French government.

^{26/} See 47 C.F.R. § 25.140(g) ("provided that its in-orbit satellites are essentially filled and that it has no more than two unused orbital locations for previously authorized but unlaunched satellites in that band") (emphasis added).

that additional orbital locations would be available if traffic growth was realized.^{27/}

Thus, in asserting in the NPRM that first round applicants had no reason to believe that the Commission might grant first round licensees expansion capacity, the Commission ignores its own pre-existing rule. Section 25.140(g) alone justified ORBCOMM's expectation that it would not be excluded from the second round; the policy reflected in that rule, particularly when combined with the Commission's actions in placing VITA and Starsys into the second processing round, support the conclusion that first round licensees had no reason to believe they would be excluded from the second round.

4. The Commission Failed to Make its Intent Known to the Affected Parties

As noted above, the Commission in a rulemaking to amend Part 22 asserted that it had broad authority to change eligibility criteria.^{28/} That decision, however, was subsequently reversed by the D.C. Court of Appeals.^{29/} In overturning the Commission, the Court focused on the Commission's lack of notice to the affected parties:

The standard of review is important here. We do not require that the agency have made the clearest possible articulation, only that, based on a 'fair reading' of its order, the petitioners knew or should have known what the Commission expected of them . . . [W]e

^{27/} Hughes Communications Galaxy, Inc., Order and Authorization, DA 96-1940, released November 21, 1996 at ¶ 11.

^{28/} See n. 17, supra.

^{29/} McElroy Electronics v. FCC, 990 F. 2d 1351 (D.C. Cir. 1993).

look not at the reasonableness of the Commission's intended interpretation, but at the clarity with which the agency made that intent known.^{30/}

As demonstrated herein, ORBCOMM was not apprised by the Commission at the time the second round was initiated (or subsequently, up until the NPRM) of the possibility of its being excluded from the second round. The Commission seems to be suggesting that because it had not earlier specifically held that first round licensees would be eligible in the second round, the first round licensees should not have jumped to the conclusion that they would retain their eligibility. As demonstrated above, however, ORBCOMM justifiably relied upon the Commission's policy providing satellite system operators with expansion capacity in assuming it would be eligible, and those assumptions were validated by the Commission's subsequent actions in placing Starsys and VITA into the second processing round. The Commission had provided no notice or suggestions to the contrary, and it should not alter its rules retroactively to impose such a policy now when none existed at the time this processing group was formed.

B. Excluding the First Round Licensees from the Second Round Would Disserve the Public Interest

In addition to its dubious legality, the Commission's proposal to exclude the first round licensees from the second processing round is bad policy. Such an exclusion would preclude the United States from realizing the manifold benefits that would

^{30/} McElroy Electronics v. FCC, 990 F. 2d at p. 1358.

be produced by ORBCOMM's use of a small, incremental amount of additional spectrum. Such a prohibition also ignores the special need for satellite systems to plan their growth many years in advance.

By way of example, ORBCOMM demonstrated in its application how the addition of a small amount of spectrum would support the deployment of twelve more satellites in its constellation, with significant attendant benefits. The requested additional spectrum was only about 4% of its currently authorized frequencies, but would dramatically increase service availability in the Northern and Southern latitudes by approximately 50% or more. As a result, ORBCOMM could provide greatly enhanced service to Alaska, a market currently underserved by telecommunications carriers.^{31/}

The greater ability to serve the Northern latitudes will also allow ORBCOMM to better meet the needs for service in Europe by dramatically reducing the times when satellites are not visible. This enhanced availability is particularly important in Northern Europe, where ORBCOMM's European licensee plans, among other things, to combine ORBCOMM's service with GSM systems to provide "gap-filler" service for automotive search and rescue. This will allow ORBCOMM to export additional services to Europe, and also will allow American manufacturers to export additional equipment to that market. Such opportunities will thus improve

^{31/} E.g., Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers Between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands, Report and Order, CC Docket No. 83-1376, FCC 94-116, released May 24, 1994, 75 R.R. 2d 279 (1994).

our international balance of trade and lead to the creation of additional jobs in the United States.

ORBCOMM's proposed modifications will also serve to enhance service within the continental United States ("CONUS"). While not as dramatic as the service availability improvements for the Northern latitudes, the additional satellites in the constellation will increase the visibility of the satellites (i.e., increase the time that multiple satellites are in view of a user), thus providing greater potential diversity to users and hence more reliable service.^{32/} Moreover, the insertion of the extra twelve satellites into ORBCOMM's constellation will minimize the impact of the failure of any one satellite. Finally, the additional satellites will serve to enhance system capacity, thereby allowing ORBCOMM to meet the expected growth in traffic that should occur as the capabilities of NVNG satellite service become better known.

The Commission's Rules recognize the special needs of satellite systems to plan their growth many years in advance. For geostationary satellites, the Rules explicitly incorporate such expansion opportunities.^{33/} Unlike terrestrial systems, a

^{32/} Allowing ORBCOMM to migrate its gateway operations to the Transit Band (keeping those operations secondary until January 1, 1997, and allowing ORBCOMM to also use the currently authorized uplink until that time) will also allow ORBCOMM to enhance the reliability of its gateway-to-satellite transmissions. Similarly, operating the individual transceiver uplinks in the Transit Band along with operations in the upper half of the 148-149.9 MHz band will increase the likelihood of finding channels that are not being used at any one time by terrestrial operators. Thus, both of the proposed changes in the modification request will enhance the reliability of ORBCOMM's services.

^{33/} See 47 C.F.R. § 25.140(g).